Brazil in the Dock: The Inter-American Court of Human Rights Rulings Concerning the Dictatorship of 1964-1985

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On July 4th 2018, the Inter-American Court of Human Rights (IACtHR) made public the condemnation of Brazil for its omission in investigating, prosecuting and condemning the public agents supposedly liable for the torture and murder of the journalist Vladimir Herzog. The events took place back in 1975, during the dictatorship of 1964-1985. After several attempts to move judicial authorities in the domestic system, the case was taken to the Inter-American Commission of Human Rights and, finally, to the IACtHR. Investigation is now open again in Brazil. However, as we will demonstrate in the following piece, there is a stark dissent between Brazilian prosecutors and judges, compromising the possibility of criminal liability for crimes committed during the dictatorship. The main obstacles come from judges and courts that continuously refuse to accept the normative force of International Human Rights Law.

Crimes Against Humanity

The debate on criminal liability for gross violations of human rights and crimes against humanity is an ancient one in the field of International Human Rights Law. The concept of crimes against humanity can be found in the discussions about Nuremberg's Tribunal jurisdiction and would be confirmed as law by the United Nations General Assembly resolutions. Even before that, throughout eighteenth and nineteenth centuries, in the context of slavery, or in 1915, in view of the political condemnation of the Armenian genocide, the term was already familiar by the international community. One could recall, for instance, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, as well as the Resolutions No. 2.712/1970 and No. 2.840/1971, of the UN General Assembly. Furthermore, the pervasive legal category of such crimes came finally into existence with the adoption of the 1998 Statute of Rome.

Amnesty Law and the Brazilian Supreme Court

Brazil has a longstanding history in ignoring those principles, be that by its federal prosecutors (at least until 2011, as we shall see) or by the judiciary. Living a dictatorship from 1964 to 1985, the military that once ruled depended heavily on a repressive apparatus that killed, tortured and exiled Brazilian citizens. In 1979, the approval of Amnesty Law was done with concrete attempts made by General

Figueiredo dictatorship to control the debate and drive the final outcome. The statutory law, textually, avoided granting amnesty to what the government called "bloody crimes" at the same time that tried to produce obscurely an auto-amnesty for crimes committed by public agents when it used the expression "connected crimes". By appropriating the pro amnesty discourse promoted by civil society movements of a "broad, general and unrestricted" amnesty to all crimes committed by political opponents (be them "bloody" or not), the authoritarian government tried to generate an ideal of a supposed consensus or political agreement that would involve "both sides" of the dispute. The fact that armed opposition had been slaughtered by repression apparatus was extensively ignored. Conservative prosecutors and judges did not feel abide by the different textual rule of the Brazilian Constitution of 1988. In the Article 8 of its Transitional Constitutional Provisions Act, the norm granted amnesty only to those who were affected by the consequences of the dictatorship's acts, without any mention that could allow for an auto-amnesty interpretation.

Brazilian Supreme Court and the Inter-American Court of Human Rights

In 2010, in a well-known ruling (ADPF 153), the Brazilian Supreme Court maintained the opinion that there was a political agreement in 1979 and that this should remain intact. Some Justices such as Gilmar Mendes even supported the idea that the constituent power managed in 1987-1988 was bound by this supposed political agreement. The Amnesty Law of 1979 should be interpreted in its supposed historical meaning, not in a sense determined by the Brazilian Constitution of 1988. This remarkable ruling is seen by the majority of federal courts and judges in Brazil as the main precedent to be bound by: no public agent has been, until now, condemned for crimes committed during the dictatorship.

During the same year of 2010, Brazil was held responsible and condemned by the IACtHR in the *Gomes Lund* case. Between 1972 and 1975, near 70 partisans of the Communist Party of Brazil that were developing a guerrilla focus in the northern Brazilian region of Araguaia were imprisoned, tortured and forced disappeared by military forces. No criminal liability was ever determined in Brazil, as never the Armed Forces recognized their crimes. The denial of personal integrity, access to justice, freedom of expression, access to information were considered by the IACtHR massive breaches of the American Convention of Human Rights, and the Brazilian Supreme Court was expressly tried by the regional court.

Prosecutors v. Judges in Brazil

From 2011 on, Brazilian federal prosecutors decided to take a position to make the Gomes Lund ruling effective in the domestic legal system. The general thesis was that the Brazilian Supreme Court had jurisdiction in the field of constitutional review, whereas the IACtHR played a role in the conventionality review. The interpretation of the 1979 Amnesty Law in relation to the American Convention of Human Rights could and should be done by the IACtHR. Under such thesis, specific

working groups were tailored to deal with transitional justice issues. Up to now, that approach has paved the way to 36 criminal lawsuits brought against public agents that allegedly committed crimes against humanity during the dictatorship time (1964-1985). Yet the interpretation that favors reading the Constitution of 1988 in a sense dictated by the Inter-American Human Rights System and against the auto-amnesty for crimes against humanity has been constantly refused by Brazilian judges and courts. Only seven rulings were accepted, however reversed or suspended by superior courts (including the Brazilian Supreme Court) or courts of appeals. The result is that we do not have, until now, any successful criminal procedure in Brazil, even after the IACtHR *Herzog* case described in the following section.

The Herzog Case

Vladimir Herzog was a journalist that was a member of the Brazilian Communist Party. He was illegally detained, tortured and assassinated in context of the Radar Operation, a movement led by the Center of Information of the Army (CIE – *Centro de Informação do Exército*) jointly with the DOI-CODI (*Destacamento de Operações de Informação – Centro de Operações de Defesa Interna* or Department of Information Operations-Center for Internal Defense Operations, the organ that coordinated the repression between military and civilian state forces). The operation had as a main target the elimination of the members of Brazilian Communist Party. After the admission by the Inter-American Commission of Human Rights (IACHR) in 2016 (the procedure before the Commission was initiated in 2009), the IACtHR delivered its ruling on March 2018 and gained immediate repercussion amongst international press, civil society and human rights organizations and specialists worldwide.

According to the IACtHR ruling, a national security doctrine animated the repression right from the 1964 *coup d'état*; in March 1970, there was the creation of an Intern Security System following a Presidential Directive on Intern Security; the DOI-CODI created the opportunity for joint work involving all security forces; the juridical system was intentionally structured and organized to avoid future liability of state agents by excluding the so-called "acts of revolution" (institutional and complementary acts parallel, contrary and superior to constitutional norms) from judicial review. The elimination of political opposition and the creation of clandestine centers for torture, along with the use of this method in a systematic fashion, helped shaping the widespread nature of the violent repression.

The Court ruled that the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 only codified preexisting customary law and *ius cogens* norms, something that would render the signature by the Brazilian State needless. Referring to different precedents from its own case law and from other regional and supranational courts, as well as the work of the 69th session of the International Law Commission of the UN, the IACtHR concluded that the *ius cogens* prohibition on crimes against humanity proscribe States from invoking statutes of limitation, *ne bis in idem* norms (double jeopardy), amnesty or any other clause or legal provision that could avoid criminal

liability by, for instance, forbidding prosecutors from charging someone with a crime committed in a particular period of time. In the end, the decision clearly determines the investigation, prosecution and, if that is the case, the condemnation of those involved in Herzog's death.

Which way ahead?

The *Herzog* ruling is clearly a step forward comparing to *Gomes Lund*. By recognizing the institutional character of the repressive apparatus, it goes beyond the concept of gross violations of human rights to expressly speaking in terms of crimes against humanity, as Brazilian prosecutors did. One should also consider that this understanding was accepted by former General Attorney and by the National Truth Commission. As we mentioned before, Brazilian prosecutors have already opened again investigations in the *Herzog* case. Recently, federal prosecutors also filed a criminal complaint charging a former police officer and, for the first time, a former military prosecutor and a former military judge for crimes against humanity committed during the civil-military dictatorship. But how will Brazilian judges act now? Contradicting the prosecutors' general thesis, on the 27th November 2018, Justice Alexandre de Moraes of the Brazilian Supreme Court gave a glimpse of how they may insist in the old way of reading the situation. He suspended the criminal lawsuit that involved the torture of political opponent Espedito de Freitas. The shape of a conservative and ill aware of the normative dimension of International Human Rights Law seems to contaminate Brazilian judicial authorities in an enduring way.

Conclusions

In our opinion, as an authoritarian façade grows in the institutional environment in Brazil, it seems unlikely to have better times for human rights in the next few years. Brazilian judges will continuously amount to state violations of the obligations that Brazil accepted once it took part in the American Convention of Human Rights, in 1992, and accepted the IACtHR jurisdiction, in 1998. One should remember that the same Brazilian Constitution of 1988 establishes the obligation of the Brazilian state to adhere to an international human rights courts (Article 7 of the Transitional Constitutional Provisions Act) and to conduct its international relations as to ensure the prevalence of human rights (Article 4, number II). It does not seem feasible that the content between prosecutors' supporters of IACtHR rulings, on the one side, and judges that rely in the Brazilian Supreme Court ruling of 2010, on the other side, will be even touched in the next few years by this later tribunal. Without civil society pressure, it seems that the now President of the Supreme Court will try to leave things undecided, since he publicly recognized that judicial authorities should now act like "defenders" instead of "forwards". By the way, he is the same that just now called the institutional rupture of 1964 a "movement", instead of a *coup d'état*. Refusing again and again the IACtHR jurisdiction, Brazilian judges make the Brazilian state an international pariah.